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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 676

JAMES BENJAMIN CAMPBELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JAMES BENJAMIN CAMPBELL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James Benjamin Campbell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on September 15, 1966.

CITATION TO OPINION BELOW

The District Court did not render a written opinion. The opinion of the United States Court of Appeals for the Sixth Circuit was filed on September 15, 1966, and has not as of this date been reported in the official or unofficial reports. A copy of said opinion is appended hereto as Appendix A.

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered on September 15, 1966. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Did the District Court err in overruling the petitioner's motion to dismiss the indictment, the petitioner's motion for judgment of acquittal made at the conclusion of the government's proof and the petitioner's motion for judgment of acquittal made at the conclusion of all the proof, all of which motions set forth the contention that the indictment and proof in support thereof failed to show a conspiracy to defraud the United States in violation of 18 U.S.C., Section 371?

STATUTE INVOLVED

The pertinent provisions of 18 U.S.C. §371 (1948), are as follows:

> §371. *Conspiracy to commit offense or to defraud United States.*
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . ."

STATEMENT

The petitioner, James Benjamin Campbell, along with Charles Taylor Thompson, William Edward Tanner and Fred Lee Key were indicted on April 13, 1965, in the Eastern District of Tennessee, Southern Division, Criminal No. 12,164 and charged with a violation of 18 U.S.C. §371 in that they did, according to the indictment, "unlawfully, willfully and knowingly conspire, confederate and agree among themselves and with each other and with other persons to the Grand Jury unknown, to defraud the United States of America, in particular the Department of Health, Education and Welfare, a department of the United States, of its right to have its program for the construction of the McMinn County Hospital, McMinn County, Tennessee, pursuant to the provisions of the Hill-Burton Act, 42 U.S.C. §291, et seq., as amended, administered honestly, fairly and free from corruption, deceit, trickery, dishonesty and kick-backs." Roy L. Johnson

was named as a co-conspirator, but was not indicted.

The petitioner, James Benjamin Campbell, and William Edward Tanner and Charles Taylor Thompson, were for several years prior to their arrest on June 4, 1964, members of the McMinn County Council, McMinn County, Tennessee. The McMinn County Council had nine members during the period in question and said petitioner and the parties above mentioned constituted only one-third of the membership of said council. During the year 1962 interest for a hospital intensified in McMinn County and resulted in a preliminary application being filed with Mary Jane Livingston, Director, Division of Hospital Services, Tennessee Department of Public Health, on April 24, 1962, seeking certain federal assistance under the Hill-Burton program. The Hill-Burton program was and is a federally sponsored program whereby the United States government contributes 52 per cent of the construction cost of certain hospitals and other medical facilities while the local sponsor, in this case McMinn County, contributes 48 per cent of said cost. The Hill-Burton program is embodied in 42 U.S.C. §291 et seq. Said preliminary application was approved by the Tennessee Department of Public Health on September 13, 1962, and by the Department of Health, Education & Welfare on January 18, 1963, subject to the satisfactory completion of the Project Construction Application, in four (4) parts by appropriate local officials. Parts one and two of said application were approved by the Department of Health, Education & Welfare on September 24, 1963; part three was approved on December 10, 1963. Part four of the project application was approved by the Department of Health, Education & Welfare on May 20, 1964, this being the first occasion the United States government became legally obligated to the payment of funds toward

the construction of said hospital. The hospital in question was to be owned by McMinn County, Tennessee; the only connection the United States government had with the project was with the financing of a certain percentage of the construction cost. The administration of the Hill-Burton program in Tennessee is handled solely by the Tennessee Department of Public Health.

The McMinn County Council at its meeting of February 11, 1963, voted to employ the firm of Galloway and Guthrey, Architects and Engineers, as architects for said hospital construction project at a fee of 6 per cent of the project construction cost. Seven members of said council were present at said meeting and *all* voted to hire Galloway and Guthrey. The actual contract for such architectural services between McMinn County and Galloway and Guthrey, Architects and Engineers, was executed by the appropriate parties on February 12, 1963. Prior to June 4, 1964, the date the petitioner and the other parties were arrested, Galloway and Guthrey had been paid for their services to date a sum in excess of $35,000.00 by McMinn County, Tennessee. Miss Livingston, Director, Division of Hospital Services, Tennessee Department of Public Health, testified that she was unable to ascertain whether any funds, state or federal, were misappropriated on said hospital construction project.

George Galloway and Charles E. Guthrey, the key witnesses for the prosecution, testified that beginning on December 18, 1962, the petitioner and others sought a kickback on the hospital project in return for Galloway and Guthrey being given the architectural contract for said hospital construction project, said hospital to be known as the Woods Memorial Hospital. According to Galloway and Guthrey, the petitioner and the other parties

met with them on numerous occasions in 1963, before and after the contract was awarded on February 12, 1963, and then further met with said petitioner and the other parties in 1964 culminating with the meeting on June 4, 1964, at the Knoxville airport at which time George Galloway delivered the sum of $6,000.00 to the petitioner, James Benjamin Campbell. Immediately following such delivery to Campbell, he was arrested by the F.B.I., as were the other parties shortly thereafter. It was clearly established that the sum of $6,000.00 delivered to petitioner Campbell at the airport was the personal funds of Galloway and Guthrey and had been withdrawn the day previous to delivery from their personal account. Galloway testified that as of February 12, 1963, he had not agreed to give any kickback.

In approximately October, 1963, the appropriate officials in McMinn County started to plan a long range school building program. The program contemplated the expenditure of several million dollars. Said school program was to be financed solely by state and local funds. Galloway and Guthrey testified that the real motive or reason for the kickback on June 4, 1964, was so that they could obtain the architectural contracts for the school program.

Prior to the indictment in this cause, the petitioner and the other parties were indicted on October 26, 1964, on a charge of violating 18 U.S.C. §371 by conspiring to defraud the United States and by conspiring to violate 18 U.S.C. §874 (which is the "kickback" statute), and on motion to dismiss on the ground the indictment did not state an offense, the government concurred in the motion and dismissed that indictment.

The jury received the case for decision and rendered

its verdict on July 17, 1965, finding Fred Lee Key not guilty, and the petitioner and the other defendants guilty.

On August 17, 1965, judgment was entered as to the petitioner, William Edward Tanner and Charles Taylor Thompson prescribing a sentence of one year imprisonment in an institution to be designated by the Attorney General.

Notice of appeal was filed on August 17, 1965, with bail on appeal fixed at $5,000.00, which was executed and the petitioner is free on bond.

REASONS FOR GRANTING WRIT

The Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States. There is a clear uncertainty and, indeed, a conflict as to what constitutes the offense of a ***conspiracy to defraud the United States***. Analyzing this issue more precisely there is an important and vital question and conflict as to what it means ***to interfere with or obstruct a lawful function of government.***

The pertinent provisions of 18 U.S.C. §371 (1948), are as follows:

> §371. ***Conspiracy to commit offense or to defraud United States.***
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . ."

One of the leading cases dealing with an interpretation of the *conspiracy to defraud* portion of §371 is *Hammerschmidt v. U. S.*, 265 U.S. 182 (1924). In this case thirteen defendants were charged with conspiring to defraud the United States by impairing, obstructing, and defeating a lawful function of government. The specific acts with which they were charged were printing, publishing, and circulating handbills and other matter intended and designed to advise and procure persons subject to the Selective Service Act to refuse to obey it. In discussing the concept "to defraud," Chief Justice Taft stated as follows at 188:

> "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. It is true that the words 'to defraud' as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds."

In sustaining the demurrer to the indictment and quashing the indictment, the Court stated as follows at 189:

"Its construction in the Horman Case can not be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it."

The case of *Haas v. Henkel*, 216 U.S. 462 (1910), has often been cited as authority for a very broad interpretation of the conspiracy to defraud portion of §371. The language relied upon for such interpretation is as follows at 479:

"The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government."

In *Hammerschmidt v. U. S.*, *supra*, Chief Justice Taft explained the meaning of the foregoing quotation in *Haas v. Henkel*, *supra*, as follows at 186-188:

"This language it is contended necessarily embraces a conspiracy to defeat the selective draft by inducing the persons required to register under it to defeat its purpose by refusing to register.

"We think the words relied on can not be given such a wide meaning when we consider the case to which they were applied, and when we replace them in the context.

* * *

"The sole question was whether the fraud there practised must have inflicted upon the Government pecuniary loss, or whether its purpose and effect to defeat a lawful function of the Government and injure others thereby was enough. That was all that Mr. Justice Lurton's words can be construed to mean. The cases

in which this case has been referred to involved unquestioned deceit or false pretense, and it was only cited in them to the point that financial loss of the Government is not necessary to violate the section."

A more recent case dealing with this aspect of §371 and one which parallels closely the case at bar is *U. S. v. Kaiser*, 179 F. Supp. 545 (S.D. Ill. 1960). In this case the defendants, toll collectors on the Rock Island Centennial Bridge, were charged with conspiring to embezzle and convert to their own use a part of the tolls received by them from motorists using the bridge. The city of Rock Island, Illinois, had constructed this bridge across the Mississippi River pursuant to an Act of Congress which authorized such action. In discussing this aspect of *conspiracy to defraud*, Chief Judge Mercer stated as follows at 547, 548, 549, and 550:

"The definitive interpretation of the application of Section 371 is found in Hammerschmidt v. United States, 265 U.S. 182, 44 S.Ct. 511, 68 L.Ed. 968. There it was argued that the phrase 'defraud the United States' as used in the statute [Section 37, predecessor of Section 371], required a cheating of the government out of some property right or money. That narrow construction of the language was rejected by the Court in the following language, 265 U.S. at page 188, 44 S.Ct. at page 512: 'To conspire to defraud the United States means primarily to cheat the government out of its money, but it also means to interfere with or to obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by means that are dishonest.' There are numerous reported cases which construe the phrase 'defraud the United States,' to the effect that the statute penalizes any conspiracy to defraud the government either

of a property interest or by obstructing some lawful function of the government. E. g., Wolf v. United States, 7 Cir., 283 F. 885, certiorari denied 260 U.S. 743, 43 S.Ct. 164, 67 L.Ed. 492; United States v. Klein, 2 Cir., 247 F. 2d 908, 916; Heald v. United States, 10 Cir., 175 F. 2d 878, certiorari denied 338 U.S. 859, 70 S.Ct. 101, 94 L.Ed. 526; Berenbeim v. United States, 10 Cir., 164 F. 2d 679, certiorari denied 333 U.S. 827, 68 S.Ct. 454, 92 L.Ed. 1113; Fowler v. United States, 9 Cir., 273 F. 15; Cendegarda v. United States, 10 Cir., 64 F. 2d 182; Outlaw v. United States, 5 Cir., 81 F. 2d 805.

"No case is found which has exceeded the limits of the Hammerschmidt rule in sustaining a conspiracy indictment. To constitute a crime against the United States the acts alleged as a violation of Section 371 must have as their purpose either a purpose to defraud the government of some property right or pecuniary interest or a purpose to obstruct or defeat some lawful function of the government, or a department, or agency thereof. In my opinion those limits should not, and cannot, be expanded. Unless this indictment reasonably charges a scheme to defraud the United States of some pecuniary interest or a scheme to obstruct some lawful function of the United States, the indictment should not be dignified by judicial recognition.

"To find a peg upon which to hang this indictment, the government relies on the language of the enabling act which provides that tolls might be charged and adjusted to provide a fund sufficient to pay for the cost of maintaining, operating, and repairing the bridge and to establish a sinking fund for the amortization of the costs of construction thereof, and, further, that after a sinking fund of sufficient size to

amortize the costs of the bridge had been established, the bridge should thereafter, be toll free. The government recites that provision and seeks to hang a governmental interest upon the congressional purpose, or hope, that some day the bridge will be toll free. The government says, first, the hope that some day the bridge would be toll free for its use, as well as for the use of other persons, is a governmental property right which is infringed by the alleged embezzlement by defendants of tolls collected from users of the bridge. It says, secondly, that the provision for a toll free bridge across the Mississippi River at Rock Island is stated in the enabling act under which the bridge was constructed and that; therefore, the alleged embezzlement by defendants of tolls collected tends to obstruct and defeat that congressional purpose.

"I think both contentions are specious. Any property right of the government involved here is as illusory as the will-o-the-wisp. The indictment does not allege, and cannot allege, that the bridge will ever be toll free. Time and circumstances alone will enable that fact, if it ever be a fact, to be known. The hope that one day a bridge will be toll free cannot be dignified by the name 'property right.' Nor does the argument that any governmental function is obstructed stand on any firmer ground. The government does not contend, and it is difficult to see how it possibly could contend, that interstate commerce or military or postal traffic is obstructed or impeded even if every charge in the indictment is true. In this context, also, the government again falls back on the argument that the acts of defendants delay the day when the bridge might be toll free and it is said, such acts frustrate the congressional hope that some day

all traffic might travel over the bridge without paying tolls.

"If Section 371 is to be expanded in such manner, truly, conspiracy is a boundless offense, and the door is opened to such nebulous charges that no man may draw a free breath. In the realm of surmise, it is conceivable that many acts of daily existence can be construed to impede or obstruct some loosely defined congressional purpose, or, as here, an expressed congressional hope. And it is almost a certainty that every act committed against the laws of a state by two or more persons acting in concert would also run counter to some congressional expression in one or more of the many acts of Congress.

"The basis of this indictment goes far beyond the proper interpretation of the statute, as suggested by the Hammerschmidt case, and the indictment is wholly unprecedented. No case is cited by the government and none has been found, which sustains a Section 371 indictment which does not allege a pecuniary loss or the frustration of some lawful function of the government, or some department or agency thereof.

"Here there is no congressional mandate that the bridge must some day be free, or even that the bridge must be built. The principal purpose of the enabling act under which the Centennial Bridge was constructed was that of permitting the City to obstruct the navigable waters of the Mississippi River by the erection and maintenance of a bridge for vehicular traffic. The fostering of interstate commerce and the benefit to military and postal traffic are recited in justification of the desirability for obstruction of the navigable stream. In its zeal to punish offenders, the govern-

ment ought not reach back into the hidden recesses of this piece of private legislation to find a basis for a federal indictment in the present circumstances.

"If defendants have embezzled tolls collected from operation of the bridge, their offense is against the City of Rock Island and the State of Illinois. They may be punished by that State in accordance with its penal laws. It is neither necessary nor desirable to extend the interpretation of Section 371 to reach a realm which lacks any logical foundation in federal interest. It may be said that conspiracy is a nebulous offense but even nebulae must admit of some limitations. If the conspiracy statute is to be applied to cases of this nature, the application should be effected by congressional action, not by judicial legislation."

See also *U. S. v. McGee*, 108 F. Supp. 909 (D.C., Wyo., 1952), and *U. S. v. Gradwell*, 243 U.S. 476 (1917).

This aspect of §371 and the manner in which it has been employed have been severely criticized in several instances. See 68 Yale L.J. 405 (1959), and *Grunewald v. U. S.*, 353 U.S. 391 (1957).

The Court of Appeals refers specifically in its opinion to the rule set forth in the *Hammerschmidt* case. It also quotes from the cases of *Dennis v. United States* 384 U.S. 855 (1966), and *Haas v. Henkel, supra*, as authority for the proposition that "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government" constitutes the offense of conspiracy to defraud the United States. However, as heretofore mentioned in the discussion of the *Hammerschmidt* case, the Supreme Court, speaking through Chief Justice Taft, did not intend that the conspiracy to defraud portion of Section 371 should have as broad

an application as intended in *Haas v. Henkel, supra.* But the Court of Appeals for the Sixth Circuit is relying on the broad, all encompassing application of this portion of Section 371 in conflict with the ruling of the Supreme Court in the *Hammerschmidt* case.

The Court of Appeals refers to the case of *Glasser v. United States*, 315 U.S. 60 (1953) as apparently authority for what constitutes a deprivation of a lawful governmental function by dishonest means. In reality, this is merely a restatement of the rule set forth in the *Hammerschmidt* case.

In the case of *Lutwak v. United States*, 344 U.S. 604 (1953), we have a bona fide showing of an obstruction and interference with a lawful governmental function by the attempt to have aliens admitted to the United States thereby circumventing the immigration quota system.

The Court of Appeals further relies on the case of *Harney v. United States*, 306 F. 2d 523 (1st Cir. 1962), as authority for its affirmance herein. In this case the obstruction or interference of a lawful governmental function was the diversion of federal funds from their true and lawful object through fraud. The petitioner respectfully submits that this case is not in point with the case at bar. There is no showing of any diversion of federal funds from their true and lawful object. The essence of petitioner's argument herein is that there is no clear exposition of what constitutes an obstruction of or interference with a lawful governmental function. All of the cases, with the exception of the Lutwak case, refer blandly to an obstruction of or interference with a lawful governmental function without explaining what constitutes such obstruction or interference. For example, in the case at bar, the Court charged the jury in this regard as follows:

> "You are further instructed that the expenditure of funds under the Hill-Burton Act 42 United States Code, Section 291 and following, to assist the states in constructing hospitals is a lawful function of the United States Government. The United States Government had a right to have *these funds* administered in accordance with the law and administered honestly and without corrupt influence, or bribery, or kickbacks or fraudulent rebates." [Emphasis added.]

There is no showing in the case at bar as to what lawful function of government was interfered with or obstructed. There is no showing in the case at bar that *these funds* were not administered honestly and without kickbacks. To say because there was a kickback related to the overall construction program even though not connected with Hill-Burton funds, that there is a violation of §371 is to stretch the intent of this aspect of §371 beyond reasonable limits. There must be some real *connection* with the Hill-Burton funds and their administration.

The *Hammerschmidt* case states that it is necessary that the legitimate official action and purpose be *defeated* by misrepresentation, chicane or overreaching. There is no showing that such official action and purpose have been defeated.

Petitioner respectfully submits that there has been no violation of 18 U.S.C. §371 (1948). There has been no real showing that a lawful governmental function has been interfered with or obstructed. It is conceivable to speculate that a large amount of human activity would interfere with or obstruct a lawful function of government. But the law does not contemplate that all such interferences violate §371. In the *Hammerschmidt* and *Kaiser* cases there was clearly an interference with a lawful govern-

mental function if the concept is carried to the extreme, but the Court, in each instance, stated that such did not violate §371. Such we contend is the case here. The indictment and proof in support thereof are too nebulous and imprecise to show a *real* violation of §371. The indictment and proof in support thereof do not reasonably charge a scheme to defraud the United States. It is true the petitioner may have violated a state law, but not §371.

For example, assuming *arguendo* the government's proof is correct, a conspiracy offense may have been complete in February, 1963. The Federal government did not legally commit itself to the project until May 20, 1964. Conceivably the government could have rejected the McMinn County project at any time before May 20, 1964. To say that even so we have a violation of §371 is to stretch one's imagination to the utmost.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

W. P. BOONE DOUGHERTY
Bernstein & Dougherty
1200 Hamilton National Bank Building
Knoxville, Tennessee

Date: October 7, 1966

AFFIDAVIT OF SERVICE

I, W. P. Boone Dougherty, Counsel for the Petitioner, being first duly sworn according to law, depose and say:

I have this ..... day of October, 1966, served a true and exact copy of the foregoing petition for a writ of certiorari upon the Solicitor General, Department of Justice, Washington 25, D.C., and J. H. Reddy, United States Attorney, Eastern District of Tennessee, 359 Federal Building, Chattanooga, Tennessee 37402, by depositing same in the United States Post Office or mail box, with first class postage prepaid, addressed to said counsel at their respective addresses.

.....
W. P. BOONE DOUGHERTY

Sworn to and subscribed before me
this ..... day of October, 1966.

.....
Notary Public

My Commission Expires: .....

Appendix

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16,832

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES TAYLOR THOMPSON, WILLIAM EDWARD TANNER and JAMES BENJAMIN CAMPBELL,
Defendants-Appellants.

APPEAL from United States District Court for the Eastern District of Tennessee, Southern Division.

Decided September 15, 1966.

Before O'SULLIVAN and PHILLIPS, Circuit Judges, and CECIL, Senior Circuit Judge.

PHILLIPS, Circuit Judge. Appellants, who were members of the County Council of McMinn County, Tennessee, were found guilty by a jury of violating the general conspiracy statute, 18 U.S.C. §371. The prosecution grew out of the solicitation and receipt by appellants

of a $6,000 kickback from the architects on a county hospital project under the Hill-Burton Act, 42 U.S.C. §291 et seq. Each of the three appellants was sentenced by the district judge, the Honorable Frank W. Wilson, to a prison term of one year. A fourth defendant was found not guilty and a fifth alleged co-conspirator was not indicted.

The one-count indictment in part charged that defendants, in violation of the conspiracy statute, did:

> ". . . unlawfully, wilfully and knowingly conspire, confederate and agree among themselves and with each other and with other persons to the Grand Jury unknown, to defraud the United States of America, in particular the Department of Health, Education and Welfare, a Department of the United States, of its right to have its program for the construction of the McMinn County Hospital, McMinn County, Tennessee, pursuant to the provisions of the Hill-Burton Act, 42 U.S.C. 291, et seq., as amended, administered honestly, fairly and free from corruption, deceit, trickery, dishonesty and kickbacks.
>
> "7. It was a part of said conspiracy that defendants would cause the Hospital Committee, McMinn County Council, McMinn County, Tennessee, which they dominated and controlled, to employ the firm of Galloway and Guthrey to perform the architectural services required in the construction of the McMinn County Hospital, at a fee representing 6% of the cost of construction.
>
> "8. It was a further part of the said conspiracy that defendants would and did request and solicit a 1% kickback payment from the firm of Galloway and Guthrey.

"9. It was a further part of the said conspiracy that defendants, subsequent to the commitment of funds to the McMinn County Hospital by the Department of Health, Education and Welfare, would and did, on June 4, 1964, induce George H. Galloway and Charles E. Guthrey, doing business as Galloway and Guthrey to kick back and pay to defendants $6000 from the fees paid to Galloway and Guthrey pursuant to the aforesaid employment contract . . . ."

Appellants had been members of the nine-member County Council, the governing body for the local county government, for several years prior to their arrest on June 4, 1964. A preliminary application was filed with the Director, Division of Hospital Services, Tennessee Department of Public Health, on April 24, 1962, seeking federal assistance under the Hill-Burton program, in the construction of a county hospital. Appellants served as members of the Hospital Committee and constituted the majority of this five-member committee. Appellant Thompson was chairman of the committee.

Under the federally sponsored Hill-Burton program, the United States contributes 52 per cent of the construction cost of certain hospitals and other medical facilities, while the local sponsor, in this case McMinn County, contributes 48 per cent.

Local officials were notified by letter under date of October 5, 1962, that federal funds in the amount of $468,000.00 had been set aside under the Hill-Burton Act for construction of the proposed hospital.

The architectural firm of Galloway and Guthrey had performed services for McMinn County on previous occasions. The partners in this firm, George Galloway and Charles E. Guthrey, were the chief Government

witnesses. They testified that beginning on December 18, 1962, the appellants and others sought a kickback on the hospital project in return for Galloway and Guthrey being given the architectural contract for the proposed hospital; that they informed FBI agents of these facts on December 20, 1962; that appellants met with them on numerous occasions in 1963, both before and after the contract for the hospital was awarded on February 12, 1963; and that further meetings were held between them and the appellants in 1964 which culminated with the meeting on June 4, 1964, at the Knoxville airport at which time George Galloway delivered the sum of $6,000.00 to appellant Campbell.

I.

The first contention of appellants is that the district court erred in overruling their motion to dismiss the indictment, the motion for judgment of acquittal made at the conclusion of the Government's proof and appellants' motion for judgment of acquittal made at the conclusion of all proof. The principal argument is that, under the facts in this case, appellants have not violated the general conspiracy statute and have not committed a crime against the United States.

18 U.S.C. Section 371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . ."

In *Dennis v. United States*, 384 U.S. 855, 859, the Supreme Court, in interpreting this statute, said:

"It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government,' *Haas v. Henkel*, 216 U.S. 462, 479, quoted in *United States v. Johnson*, 383 U.S. 169, 172."

In *Hammerschmidt v. United States*, 265 U.S. 182, in reversing a conviction for conspiracy to defraud the United States, the court, speaking through Chief Justice Taft, stated:

"To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." 265 U.S. at 188.

In *Haas v. Henkel*, 216 U.S. 462, the indictments charged a conspiracy by several defendants to cause the Bureau of Statistics for the Department of Agriculture to issue false cotton reports. In upholding the conviction, the Court said:

"These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons and explanations involved great expense, it is clear that practices of this kind would

deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government. Assuming, as we have, for it has not been challenged, that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled. *Hyde v. Shine*, 199 U.S. 62, 81; *United States v. Keitel*, 211 U.S. 370, 394; *Curley v. United States*, 130 Fed. Rep. 1; *McGregor v. United States*, 134 Fed. Rep. 195." 216 U.S. 479, 480.

In *Glasser v. United States*, 315 U.S. 60, rehearing denied, 315 U.S. 827, in affirming in part and reversing in part a conviction for conspiracy, the Court stated that "The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a 'defrauding' within the meaning of § 37 [now § 371] of the Criminal Code." 315 U.S. at 66.

In *Lutwak v. United States*, 344 U.S. 604, rehearing denied, 345 U.S. 919, the Court affirmed the convictions of defendants charged with conspiracy "'to defraud the United States of and concerning its governmental function and right of administering' the immigration laws and the Immigration and Naturalization Service, by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans." In this case veterans had gone to Paris and married French citizens for the purpose of obtaining their entry into the United States under the War Brides Act. The parties to the marriages had no intention to live together as husband and wife and had agreed to take whatever steps necessary to sever their legal ties.

In *Harney v. United States*, 306 F. 2d 523 (C.A. 1), cert. denied, 371 U.S. 911, the court affirmed convictions of a conspiracy to defraud the United States under a ninety per cent federally-financed highway program. The evidence established that the Commonwealth of Massachusetts paid an excessive amount for the acquisition of land as a result of the fraudulent acts of the defendants and co-conspirators. The Court held that the cheating and over-reaching as to the Commonwealth resulted in an obstruction of a lawful function of the United States, saying:

> "It is, of course, not necessary to show that federal funds were actually paid to the Commonwealth in 90% reimbursement for its taking of the Damort land. Conspiracy is a crime even though the contemplated offense may never be consummated. It is enough to show a scheme whereby through fraud federal funds in normal course would be diverted from their true and lawful object. That has been shown, for the thrust of the fraudulent scheme alleged and proved to the jury's

satisfaction was directed against and would expend itself on the federal fisc. See McGunnigal v. United States, 151 F. 2d 162 (C.A. 1, 1945), cert. denied, 326 U.S. 776, 66 S. Ct. 267, 90 L. Ed. 469 (1945)." 306 F. 2d at 531.

The indictment in the present case charges that defendants conspired to defraud the United States of its right to have its program for the construction of the McMinn County Hospital, pursuant to the Hill-Burton Act, administered honestly, and fairly, and free from kickbacks.

Appellants contend that there has been no interference with or obstruction of a lawful function of the United States and no conspiracy to defraud the United States; that the Government was not cheated out of any funds or property; that the kickback had no connection with Hill-Burton funds in that the architectual fees were paid by McMinn County and Hill-Burton funds were not related to this payment; and that the hospital as built is apparently free of architectural defects, so that the United States and McMinn County received full value for the payment for architectural services, regardless of the kickback.

Even if it should be found that there is no proof that the Government has been cheated out of money or property, this would be irrelevant under the foregoing decisions. Likewise, the fact that McMinn County may have received a hospital free from any apparent defects is a spurious argument. The question is whether or not the Hill-Burton Act was administered honestly and without corrupt influence. The district court instructed the jury on this point in the following language:

"Now in order that you may better understand the indictment and the statute upon which it is based, which

I have just read to you, let me define some of the terms used either in the indictment or in the statute. In the indictment you will notice that the word unlawfully is used and in essence this means contrary to law. Hence to do an act 'unlawfully' means to willfully do something which is contrary to law. The act, an act is done willfully if it is done voluntarily and with the specific intent to do that which the law forbids; that is to say, with bad purpose either to disobey or disregard the law. You will note that the acts charged in the indictment are charged to have been done knowingly. The purpose of adding the word knowingly was to insure that no one would be convicted of an act done because of mistake or inadvertence or any other innocent reason. The word 'defraud' as used in the statute means to deceive or to cheat; to deprive another of a right, either by obtaining something by deception or artifice, by appropriating something wrongfully, or by taking something wrongfully without the knowledge or consent of the owner, in this case the United States of America. To conspire to defraud the United States as those words are used in the indictment and as they are used in the statute that I have read to you means either one or both of two things; in the first place, it can mean to conspire to cheat the United States Government or some agency thereof out of some property right, or pecuniary interest. That's one meaning of the term 'to defraud the United States.' A second meaning of the term 'to defraud the United States' means to conspire to interfere with or to obstruct some lawful function of the United States Government or a department or agency thereof by deceit, or craft, or trickery, or some dishonest means.

"A conspiracy to accomplish either of the foregoing

purposes would be a conspiracy to defraud the United States as the word, as the words 'defraud the United States' are used in the statute that I have read to you and in the indictment.

"You are further instructed that the expenditure of funds under the Hill-Burton Act 42 United States Code, Section 291 and following, to assist the states in constructing hospitals is a lawful function of the United States Government. The United States Government has a right to have these funds administered in accordance with the law and administered honestly and without corrupt influence, or bribery, or kickbacks or fraudulent rebates.

"In regard to the Hill-Burton Act, you are instructed that the Hill-Burton Act neither authorizes or requires the payment of any set or any specific architectural fee in the construction of a hospital under the Act.

"Now let me turn your attention to the definition of a conspiracy. A conspiracy is a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into any express or any formal agreement, or that they stated in words or writing what the scheme was to be, or how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act.

"In this instance the alleged unlawful act was to defraud the United States as I have defined those terms for you. It is only a conspiracy to defraud the United States that constitutes the offense here charged, and not a conspiracy to defraud any other persons or party.

* * *

"Thus, a conspiracy is in the nature of a partnership to violate the law. There must be intentional participation in the illegal scheme or design or purpose. If the parties in any manner work together to advance an unlawful scheme, having its promotion in view and actuated by a common purpose of accomplishing the common unlawful end of defrauding the United States, then they would be guilty of a conspiracy."

Appellants contend that the $6,000 kickback money came from the personal funds of Galloway and Guthrey, which in turn came from the funds of McMinn County, and that there is no showing that any part of this $6,000 was reimbursed from federal funds. There is evidence in the record from which the jury could have concluded that the county was reimbursed from Hill-Burton funds for part of the architects' fee. Federal funds in the amount of $468,000 tentatively had been committed as early as October 5, 1962. This commitment was based upon contemplated costs of the hospital, which it is reasonable to believe included architect fees. "Project Construction Application — Part 4," dated May 11, 1964, and signed by the County Manager, itemized under the heading "Estimate Costs in Which the Federal Government May Participate," architects fees in the amount of $39,554.00. On January 18, 1963, the Director of the Division of Hospital Services of the Tennessee Department of Public Health, administering the Hill-Burton hospital program, advised that $468,000 of federal funds had been set aside for the McMinn County hospital, based upon a total estimated cost of $900,000. This letter also requested a copy of the contract with the architects. It is clear from the record that the Hill-Burton hospital and the architect fee were very much interwoven and related.

One of the architects testified that "We told them we

would consider doing the hospital for five per cent in lieu of our normal fee of six per cent and giving the county back one per cent rather than a group of individuals. He didn't seem to think they would agree to it." If the architect fee had been five per cent, and if the one per cent kickback had been eliminated, there would have been a substantial saving in costs, fifty-two per cent of which would have been reflected in Hill-Burton funds.

We hold, however, that it was not necessary under the foregoing decisions for the Government to prove that part of the architect fee was reimbursed with federal funds. We construe the payment of the $6,000 kickback as an overt act in furtherance of a conspiracy to obstruct a lawful Government function. The administration of this Hill-Burton project, from shortly after tentative commitment through final acceptance, included a dishonest influence in the form of a kickback. This constituted a crime within the scope of the statute under the facts of this case.

Appellants further contend that the kickback was for the purpose of obtaining a school contract (locally financed) and not the hospital contract. The chief Government witnesses, Galloway and Guthrey, testified that the kickback was for the hospital contract. This presented a jury question, and the jury answered this issue adversely to appellants.

We hold that the district court did not err in overruling appellants' motion to dismiss the indictment and their motions for acquittal; and that there is substantial evidence, taking the view most favorable to the Government (*Glasser v. United States*, *supra*, 315 U.S. at 80) to support the verdict of the jury that appellants were guilty of committing an offense against the United States in violation of 18 U.S.C. § 371.

II.

Appellants further contend that the district court erred in failing to hold that, if there were a violation of the statute, appellants were entrapped as a matter of law, and in failing to grant a verdict of acquittal on this ground.

This contention is based upon the fact that beginning on December 20, 1962, the FBI was aware of the conspiracy. On that date Galloway and Guthrey went to local FBI agents and informed them that appellants had approached the architectural firm seeking a one percent kickback on the proposed hospital contract. From this date until June 1964 both Guthrey and Galloway made several statements to the FBI. Mr. Galloway on cross-examination testified that:

"Q If you didn't intend to give any kick-back, and there wasn't any federal funds involved, why did you go to the FBI on the morning of December 20, 1962?

"A We were quite concerned about it, we thought at the time they were federal funds, we didn't know. It had been advertised as the Hill-Burton hospital which is a federally endowed hospital, and we didn't know who to go to, so we finally decided to go to the FBI. They were talking about a federal project.

"Q There weren't any federal funds involved then and you hadn't agreed to a kick-back, let me ask you this. Were you trying to entrap somebody?

"A I wasn't trying to do anything, I was just trying to find out what was going on. We went to the FBI to report it.

"Q And to seek their advice on what to do?

"A Yes, we went to seek their advice.

"Q I'll ask you if it isn't true that from that day on, December 20, 1962, up through June 4, or even later,

if you didn't make periodic reports to the FBI all the way through, and receive their advice?

"A We didn't receive advice, they told us from the beginning that they couldn't tell us what to do, the decision was ours. They did say we should report to them what transpired.

"Q And you did periodically go there and give interviews, make statements under oath, and all that?

"A Yes.

"Q They didn't protest, they took those statements from you?

"A They took them. I made the statements, I dictated the statements, two or three of them myself, to their stenographer.

"Q Didn't they tell you that they talked to—didn't Mr. Ingram tell you that he talked to the attorney general here about the possibility of being a federal violation?

"A They were going to contact the US attorney to determine whether or not there was a federal violation.

"Q Now, a federal violation of what?

"A This kick-back.

"Q There hadn't been any kick-back then, had there?

"A I can't enlighten you any further. I mean, this was the reason we went there, just simply to try to find out what we should do.

"Q You mean you went there to see whether or not if you went on through and promised a kick-back, you could lead them into a federal violation?

"A No, sir, I resent that, because these people didn't tell us to do anything. As a matter of fact they made it very clear that they were an investigating agency and they could not tell us what to do, and whatever decision we made it was our own."

In *Sorrells v. United States*, 287 U.S. 435, 451, the Court, speaking through Chief Justice Hughes, said:

> "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."

In reaffirming its opinion in *Sorrells* the Court stated in *Sherman v. United States*, 356 U.S. 369, 372:

> "[T]he fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." (Emphasis supplied.) See 287 U.S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

Further in *Sorrells*, the Court said:

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Grimm v. United States*, 156 U.S. 604, 610; *Goode v. United States*, 159 U.S. 663, 669; *Rosen v. United States*, 161 U.S. 29, 42; *Andrews v. United States*, 162 U.S. 420, 423; *Price v. United States*, 165 U.S. 311, 315; *Bates v. United States*, 10 Fed. 92, 94, note, p. 97. *United States v. Reisenweber*, 288 Fed. 520, 526; *Aultman v. United States*, 289 Fed. 251." 287 U.S. at 441.

The law of entrapment was reviewed and applied by this

court in *United States v. Gosser*, 339 F. 2d 102 (C.A. 6), cert. denied, 382 U.S. 819. See also *United States v. Littwin*, 338 F. 2d 141 (C.A. 6), cert. denied, 380 U.S. 911; *Morales v. United States*, 260 F. 2d 939 (C. A. 6); *Nero v. United States*, 189 F. 2d 515 (C.A. 6), cert. denied, 342 U.S. 872, rehearing denied, 342 U.S. 899; and *Cermak v. United States*, 4 F. 2d 99.

In the present case the testimony establishes that the impetus for the conspiracy came from the appellants. This is not a case where the criminal conduct was the product of creative activity of Galloway and Guthrey or FBI agents. It therefore cannot be held that entrapment is established as a matter of law. Thus, "the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Sherman v. United States*, *supra*, 356 U.S. 369, 377. See also *Masciale v. United States*, 356 U.S. 386, rehearing denied, 357 U.S. 933; *Lopez v. United States*, 373 U.S. 427, rehearing denied, 375 U.S. 870.

III.

Appellants further contend that the jury was improperly instructed on the law of entrapment.

The charge of the court is as follows:

"The defense of unlawful entrapment has been offered in this case on behalf of the defendant charged in the indictment. In this regard I would instruct you that the law recognizes two kinds of entrapment—lawful entrapment and unlawful entrapment. Where a person has no previous intent or no previous purpose to violate the law, but is induced or persuaded by law enforce-

ment agents to commit a crime or agents of the government, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person already has the readiness and willingness to violate the law or to break the law, the mere fact that government agents provide what appears to be a favorable opportunity this is not unlawful entrapment and the mere fact that the government seeks to collect evidence of the offense, this would not constitute unlawful entrapment and consequently would be no defense, rather this would be lawful entrapment. Unlawful entrapment can only exist where a law enforcement officer or an agent of the government suggests or induces or persuades a person to commit an offense. An agent of the government may include, of course, any person acting upon the instructions or directions of any law enforcement officers of the United States.

"If then the jury should find from the evidence that, before anything at all occurred respecting the alleged offenses involved in this case, the defendant or any particular defendant was ready and willing to commit the offense such as that charged in the indictment whenever the opportunity was afforded, and the government, at the most, merely offered the opportunity to commit the offense or was merely collecting evidence of the commission of the offense, the accused is not entitled to the defense of unlawful entrapment. Likewise, if an officer or agent of the government or one acting on behalf of the government is not a party to the inducing or persuading or suggesting of the commission of an offense, then no unlawful entrapment could exist, and no defense of unlawful entrapment could be asserted by

the defendant.

"If, on the other hand, the jury should find that the particular accused had no previous intent or no purpose to commit any offense of the character here charged, and he did so only because he was persuaded to do so or induced to do so by some agent of the government, then the prosecution has in effect misled an innocent person, and the defense of unlawful entrapment is a good defense, and the jury should acquit such particular accused."

This charge is based substantially upon "Jury Instructions and Forms for Federal Criminal Cases," by the Honorable William C. Mathes. We hold it to be a correct statement of the law. *Sherman v. United States*, *supra*, 356 U.S. 369; *Masciale v. United States*, *supra*, 356 U.S. 386, rehearing denied, 357 U.S. 933; *Sorrells v. United States*, *supra*, 287 U.S. 435; *Silva v. United States*, 212 F. 2d 422 (C.A. 9); *Eastman v. United States*, 212 F. 2d 320 (C.A. 9); *Trice v. United States*, 211 F. 2d 513 (C.A. 9), cert. denied, 348 U.S. 900.

IV.

It is further asserted that the district court erred in admitting the testimony of FBI Agent Polattie concerning statements made by appellant Thompson after his arrest, at a time when he was not represented by counsel.

The statements complained of were not incriminating admissions and were offered by the Government solely to corroborate witnesses Galloway and Guthrey on the fact that meetings had been held between the parties. Counsel for Thompson read extensively from Thompson's statement during the trial and finally offered it in evidence.

Agent Polattie testified that he warned Thompson of his constitutional rights, including his right to remain silent and his right to counsel. There is no showing that Thompson ever asked for or was denied the assistance of counsel. Thompson was arrested at his home in Etowah, Tennessee, on June 4, 1964, at 6:30 p.m. under a warrant issued earlier that day. He was taken to the FBI office in Knoxville, Tennessee, for about twenty-five minutes of questioning, then was taken before the United States Commissioner that same evening.

Under these facts, appellants' reliance upon *Escobedo v. Illinois*, 378 U.S. 478, *Massiah v. United States*, 377 U.S. 201, and *Spano v. United States*, 360 U.S. 315, is misplaced.

The trial took place in July 1965. *Miranda v. Arizona*, 384 U.S. 436, is not applicable. *Johnson v. New Jersey*, 384 U.S. 719.

V.

Complaint also is directed to the refusal of the district judge to submit three special requests in his charge to the jury. We find the charge, considered as a whole, adequately covered the theories of the defense and that no reversible error was committed in the refusal of the district judge to grant the requests for special charges.

All other contentions have been considered and are found to be without merit.

Affirmed.